



## **European Union publishes new rules on subsidies by third countries**

23. December 2022

On 23 December 2022, the new Foreign Subsidies Regulation (FSR) was published in the Official Journal of the European Union (see [► here](#)). Until now, the European Union (EU) had no instruments to address distortions of competition caused by subsidies provided by third countries, i.e. those outside the EU. As a key element in the implementation of the EU's industrial strategy, the new rules are designed to change this and help ensure a level playing field in the internal market. It should hardly be a secret that Chinese companies in particular are to be prevented from gaining an unfair advantage over European competitors through State support on the internal market. However, the Regulation also applies to subsidies from other third countries.

We provide an overview of the new Regulation.

1. What was the reason for the adoption of the FSR and what is its purpose?
2. What is the scope of the FSR?
3. What new investigation tools does the Commission have at its disposal?
4. What is the European Commission examining?
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## **1. What was the reason for the adoption of the FSR and what is its purpose?**

The importance of foreign investment for the EU becomes clear when considering the following figures: in 2017, one third of investments worldwide were directed at companies in the EU, and approximately 100,000 foreign companies operated in the single market. The fact that Europe is an attractive location for investment has predominantly positive effects, such as creation of jobs, more growth and competitiveness.

However, the European Commission has concluded that subsidies from third countries also entail the risk of distorting the internal market. There is a lack of reliable data in this regard but according to the European Commission, the number of examples of competitive harm caused by non-EU subsidies increase. These include cases where subsidies by third countries facilitated the acquisition of EU companies, influenced investment decisions, distorted trade in services or otherwise influenced the behaviour of their recipients in the EU market. The European legislator has concluded that fair competition is particularly at risk in the case of foreign subsidies of mergers that result in a change of control over EU-based companies or of companies that are awarded contracts in public procurement procedures. In principle, however, distortion could occur in any economic activity.

While subsidies from Member States are subject to the strict rules of EU State aid control, there has been a regulatory gap regarding the control of subsidies from third countries due to the lack of comparable regulations. Consequently, the Commission lacked instruments to act against possible distortions of the European internal market from the outside. The new Regulation is intended to close this gap.

## **2. What is the scope of the FSR?**

The Regulation covers subsidies granted by third countries to undertakings - including public undertakings controlled directly or indirectly by the State – engaging in an economic activity in the internal market. The exercise of an economic activity is presumed, among others, in the case of undertakings acquiring control of or merging with an undertaking established in the

Union or undertakings participating in a public procurement procedure in the Union (Art. 1(2) FSR).

Thus, the FSR only applies to a “foreign subsidy” within the meaning of the Regulation. This is the case if (i) a third country directly or indirectly provides a financial contribution, (ii) which confers a benefit on an undertaking engaging in an economic activity in the internal market, (iii) and (iv) which is limited, in law or in fact, to one or more undertakings or industries (Art. 3(1) FSR).

### 3. What new investigation tools does the Commission have at its disposal?

The new rules provide **three instruments** for the Commission to review foreign subsidies.

First, a **concentration** shall be notified to the Commission if it involves:

- at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an aggregate turnover in the Union of at least **EUR 500 million**, and
- the following undertakings were granted combined aggregate financial contributions of more than **EUR 50 million** from third countries in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest (Art. 20(3) FSR):
  - in the case of an acquisition, the acquirer or acquirers and the acquired undertaking,
  - in the case of a merger, the merging undertakings,
  - in the case of a joint venture, the undertakings creating a joint venture and the joint venture.

The notification must be made after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest, but necessarily prior to its implementation (Art. 21(1) FSR).

Second, there may be a reporting obligation in the context of **public EU procurement procedures**. A foreign financial contribution is subject to notification if:

- the estimated value of the public procurement or framework agreement net of VAT, or of a specific procurement under the dynamic purchasing system, is equal to or greater than **EUR 250 million** (special provisions apply where the procurement is divided into lots), and
- the economic operator, including its subsidiary companies without commercial autonomy, its holding companies, and, where applicable, its main subcontractors and suppliers involved in the same tender in the public procurement procedure was granted aggregate financial contributions in the three years prior to notification or, if applicable, the updated

notification, equal to or greater than **EUR 4 million** per third country (Article 28(1) FSR).

If these conditions are met, economic operators participating in a public procurement procedure shall notify the contracting authority or contracting entity of all foreign financial contributions. In all other cases, economic operators shall list in a declaration all foreign financial contributions received and confirm that they are not notifiable (Art. 29(1) FSR).

In the event of failure to notify the undertakings concerned face a fine of up to 10 % of their aggregate turnover in the preceding financial year, both in the case of mergers and in the case of public procurement procedures (Art. 26(3)(a), Art. 33(3)(a) FSR).

In the case of the first two instruments, the undertakings concerned are therefore obliged to notify. The parties involved must comply with this obligation as of 12 October 2023, even if they are not specifically requested to do so.

Third, the Commission can also investigate foreign subsidies in all other market situations as well as regarding concentrations and public procurements below the above-mentioned thresholds **ex officio and** without prior (notification) of the parties involved (Art. 9(1) FSR). In public procurement procedures, however, the Commission's reviews are limited to awarded contracts. Also, they shall not result in the cancellation of the decision awarding a contract or in a termination of a contract (Art. 9(2) FSR).

#### **4. What is the European Commission examining?**

In addition to the question of whether the subsidy is a "foreign subsidy", the Commission must examine whether there is a **distortion in the internal market**. This is the case if a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and thereby actually or potentially negatively affects competition in the internal market. In its assessment, the Commission takes into account various indicators, such as the amount and the nature of the foreign subsidy, the situation of the undertaking and of the markets or sectors, the level and evolution of the undertaking's economic activities on the internal market, as well as the purpose and conditions attached to the foreign subsidy (Art. 4(1) FSR).

In addition, the European legislator has identified categories of foreign subsidies that are most likely to distort the internal market. These include foreign subsidies in the form of unlimited guarantees, foreign subsidies to an ailing undertaking, export financing measures that do not comply with the OECD Arrangement on officially supported export credits, foreign subsidies that directly facilitate a concentration, and foreign subsidies that enable the submission of an unduly advantageous tender (Art. 5(1) FSR).

It should be noted that in certain cases **presumptions or exemptions** apply:

- A distortion of the internal market is considered **unlikely** if the total amount of a foreign subsidy to an undertaking does not exceed the threshold of **EUR 4 million** over any

consecutive period of three years (Art. 4(2) FSR).

- A foreign subsidy to an enterprise is **not considered to distort the internal market** if its total amount to an undertaking does not exceed the threshold for **de minimis aid** (EUR 200,000) per third country over any consecutive period of three years (Art. 4(3) FSR).
- A foreign subsidy may be considered **not to distort the internal market** to the extent that it is aimed at making good the damage caused by **natural disasters or exceptional occurrences** (Art. 4(4) FSR).

The application of the criteria for assessing the existence of a distortion in the internal market is to be further specified in the future. The Commission is obliged to publish corresponding guidelines at the latest on 12 January 2026.

## 5. What happens in the event of an identified distortion in the internal market?

Where the Commission has identified a distortion in the internal market, the Commission may **balance** the negative effects of the foreign subsidy in terms of distortion against its positive effects on the development of the relevant subsidised economic activity concerned on the internal market. When balancing, other positive effects of the foreign subsidy, such as the broader positive effects in relation to the relevant EU policy objectives, can be taken into consideration (Art. 6(1) FSR). Regarding the balancing test, the Commission is also obliged to issue guidelines at the latest on 12 January 2026.

The Commission may impose **redressive measures**, unless it has accepted commitments offered by the undertaking under investigation (Art. 7(1) FSR). Possible commitments or redressive measures include reducing capacity or market presence, refraining from certain investments, or divesting certain assets (Art. 7(4) FSR). In deciding whether and to what extent these are necessary, the Commission must consider the results of the balancing test. The principle of proportionality must be respected. The commitments or redressive measures must fully and effectively remedy the distortion actually or potentially caused by the foreign subsidy in the internal market (Art. 7 (3) FSR).

Prior to the completion of the investigation and the adoption of definitive measures, the Commission may also adopt interim measures to preserve competition in the internal market and prevent irreparable damage. In order to do so, there must be sufficient indications that a financial contribution constitutes a “foreign subsidy” and distorts the internal market and that there is a risk of serious and irreparable damage to competition on the internal market (Art. 12(1) FSR).

Finally, the Commission can **prohibit concentrations or the award of contracts** (Art. 25(3)(c), Art. 31 (2) FSR). If they have already been implemented and must be reversed, this can lead to considerable damage for the undertakings concerned.

## 6. How does a review by the European Commission work?



The Commission examines in two stages. First, there is a **preliminary review**. In the case of concentrations, the Commission has 25 working days after the receipt of a complete notification, in the case of public procurement only 20 working days after the receipt of a complete notification. In the preliminary review, the Commission has to make a preliminary assessment as to whether the subsidy in question constitutes a foreign subsidy within the meaning of the Regulation and whether it *could* distort the internal market.

If the Commission answers in the affirmative, it initiates a so-called **in-depth investigation**, which it must complete within 90 working days after the opening of the investigation in the case of concentrations and within 110 working days after the receipt of the complete notification in the case of public procurement procedures.

Before the end of the Commission's assessment, i.e. the preliminary review or the in-depth investigation, the concentration may not be implemented or the contract awarded to the undertaking under review. A violation of the **prohibition of implementation** (*gun jumping*) in the case of concentrations can lead to a fine of up to 10 % of the aggregate turnover achieved in the preceding financial year (Art. 26(3)(b) FSR).

In the course of its review, the Commission has various **powers of investigation**. These include requests for information and inspections within the Union as well as – with the consent of the government of the third country – outside the Union. To enforce these powers, the Commission can impose fines and periodic penalty payments on undertakings if, for example, they provide incorrect or incomplete information or do not tolerate an inspection within the EU.

## **7. What does this actually mean for companies?**

Companies that have received foreign subsidies should proactively check as to whether potential concentrations or procurement bids will be subject to a notification obligation as of 12 October 2023. In particular, as long as the Commission has not specified the criteria for examining distortion in the internal market (see above, point 4) through guidelines, it needs to be examined carefully whether an action may fall within the scope of the FSR. The Commission's guidelines are expected to provide more clarity at a later stage.

Furthermore, in the case of concentrations, the respective national as well as EU merger control law need to be respected. This is because the FSR does not affect the rules on merger control. It is therefore conceivable that both these and the FSR give rise to notification obligations. It is not fully clear how the Commission will proceed in the case of double control.

Finally, the additional controls on the (potentially) covered transactions will lead to additional effort and further delays. The European legislator considered this to be justified, especially as only large transactions are covered due to the thresholds.

However, the considerable effort related to a potential notification has not been entirely lost on the Commission. On 6 February 2023 the Commission published a draft Implementing

Regulation on proceedings pursuant to the FSR, including the notification forms. Interested parties can provide feedback until 06 March 2023 (see [► here](#)). Adoption by the Commission is planned for the second quarter of 2023.

According to the draft, parties will be able to request waivers for information that is not necessary for the examination of the notification or not reasonably available. Also, not every foreign financial contribution has to be listed in the forms. The introduction of thresholds is intended to limit the extent of the notification. In the case of concentrations, only those financial contributions need to be listed, where the individual amount is EUR 200,000 or more and the total amount of contributions per third country and per year is EUR 4 million or more. In public procurement procedures, only those financial contributions have to be listed that fall into certain categories considered most likely to distort the internal market or relate to operating costs and whose aggregate amount equals to EUR 4 million or more per third country in the three years prior to notification. These thresholds, however, only concern the obligation to notify certain foreign financial contributions to the Commission. The contributions below those thresholds must nevertheless still be considered in the context of the overall thresholds of the FSR. Thus, the internal burden for companies to monitor all financial contributions from third countries remains.

Until a procedural routine has been established, close coordination with the competent authorities will be necessary, whereby, especially in the case of public procurement, the boundaries for contact between the awarding authority and the bidder must be observed.